

# ALLEN V. MILLIGAN: ANTICLASSIFICATION AND THE VOTING RIGHTS ACT

GRAHAM STINNETT\*

## INTRODUCTION

The Voting Rights Act of 1965 (“VRA”)<sup>1</sup> is on its last leg. Long considered the “crown jewel” of the Civil Rights Movement,<sup>2</sup> the VRA has been praised as “one of the most effective statutes ever enacted.”<sup>3</sup> In *Shelby County v. Holder*,<sup>4</sup> however, the Supreme Court invalidated what had been the VRA’s lifeblood, holding that it is unconstitutional to use the VRA’s Section 4(b) coverage formula to determine which states are subject to the preclearance requirements in Section 5.<sup>5</sup> Prior to *Shelby County*, Section 4(b) rooted out jurisdictions with a history of racially discriminatory voting practices, requiring them to comply with Section 5 by obtaining approval or “preclearance” from the federal government before implementing election law changes.<sup>6</sup> While the Court did not rule on the constitutionality of Section 5 itself, invalidating Section 4(b) effectively rendered Section 5 a dead letter.<sup>7</sup>

At the *Shelby County* oral argument, Justice Kennedy suggested that Section 5 was unnecessary because litigants could use Section 2 as an effective substitute.<sup>8</sup> Section 2 prohibits the states, in general, from

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J.D. Candidate, Duke University School of Law, 2023. B.A., University of Southern California, 2014. For Audrey.

1. 52 U.S.C. §§ 10101–10702.

2. Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE (June 25, 2013, 3:50 PM), <https://slate.com/news-and-politics/013/06/supreme-court-and-the-voting-rights-act-goodbye-to-section-5.html>.

3. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2144, 2144 (2015).

4. 570 U.S. 529 (2013).

5. U.S. Dep’t of Just., About Section 5 of the Voting Rights Act, <https://www.justice.gov/crt/about-section-5-voting-rights-act> (July 14, 2022).

6. See Elmendorf & Spencer, *supra* note 3, at 2144–45.

7. U.S. Dep’t of Just., About Section 5 of the Voting Rights Act, *supra* note 5.

8. Transcript of Oral Argument at 37, *Shelby Cnty.*, 570 U.S. 529 (No. 12-96).

structuring elections “in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color.”<sup>9</sup> But, significant practical differences between Section 2 and Section 5 litigation have led election law scholars to view Section 2 as “weak and ineffective” when compared to Section 5.<sup>10</sup>

Section 2 has been the only core provision of the VRA remaining post-*Shelby*. Yet, nearly a decade after *Shelby*, the Supreme Court issued an emergency order signaling that Section 2 is now in its crosshairs, which could ultimately sound the death knell for the onetime “super-statute.”<sup>11</sup> On February 7, 2022, the Court stayed a three-judge District Court order in *Merrill v. Milligan*<sup>12</sup> that would have required the state of Alabama to draw a second majority-Black congressional district.<sup>13</sup> Because the emergency order came through the Court’s “shadow docket,”<sup>14</sup> the majority did not explain its reasoning for putting the order on hold. Nevertheless, the Court’s move portended trouble for Section 2, particularly because the case had been considered “a pretty clear Section 2 violation.”<sup>15</sup> Scholars suspect that

9. 52 U.S.C. § 10301.

10. Elmendorf & Spencer, *supra* note 3, at 2143. Section 5’s strength came from “its substitution of administrative for judicial procedures; its establishment of a fairly bright-line results test; and, critically, its placement of the burden of proof on the party seeking preclearance.” In contrast, Section 2 cases “are adjudicated in judicial rather than administrative fora, the legal standard for liability under section 2 is murky, and the burden of proof falls on the party challenging the election law at issue rather than the party defending it.” *See id.* at 2152, 2155. For a compilation of successful Section 2 cases since 2006, see Brennan Center for Justice, *The Use of Section 2 to Secure Fair Representation* (Aug. 13, 2021), <https://www.brennancenter.org/our-work/research-reports/use-section-2-secure-fair-representation>.

11. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215–16 (2001).

12. 142 S. Ct. 879 (2022) (mem.) *sub nom.* Allen v. Milligan, 142 S. Ct. 879 (2023). On January 16, 2023, Wes Allen succeeded John H. Merrill as the Alabama Secretary of State. Pursuant to Supreme Court Rule 35.3, Allen was automatically substituted as a party on January 26, 2023.

13. Singleton v. Merrill, 582 F. Supp. 3d 924, 1033 (N.D. Ala. 2022).

14. Coined by William Baude, the “shadow docket” refers to “a range of [Supreme Court] orders and summary decisions that defy [the Court’s] normal procedural regularity.” William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015). Shadow docket decisions are controversial because they are made without full briefing or oral argument and are rarely explained. *Id.*

15. Dahlia Lithwick, *The Supreme Court Wants You to Believe Voting Rights are Too Complicated. They’re Not.*, SLATE (Feb. 15, 2022, 2:40 PM), <https://slate.com/news-and-politics/2022/02/merrill-v-milligan-section-2-voting-rights-act-racial-redistricting-supreme-court.html> (quoting Franita Tolson, Professor of Law, University of Southern California Gould School of Law). *See also*, Transcript of Oral Argument at 9, *Milligan*, 142 S. Ct. 879 (No. 21-1086) (“[W]hat strikes me about this case is that under our precedent it’s kind of a slam dunk”) (Kagan, J.).

the Court may now be prepared to use the case to either substantially limit the scope of Section 2, or to invalidate it entirely.<sup>16</sup>

With the Supreme Court threatening to pull the plug on the VRA, this Commentary examines how the Court arrived at this point. Although the story is multifaceted,<sup>17</sup> this Commentary proposes that a fundamental disagreement on the proper approach to civil rights and antidiscrimination law is key to understanding the VRA's dismantling. Two dueling principles—anticlassification and antisubordination—form the poles of this debate.<sup>18</sup> An analysis of the Supreme Court's jurisprudence reveals a broad and steady shift towards embracing the anticlassification principle across all areas of antidiscrimination law, including affirmative action, employment law, and voting rights. Understanding this trajectory is valuable to reading the tea leaves in *Milligan* and to recognizing the direction the Court is taking antidiscrimination law generally.

## I. THEORETICAL FRAMEWORK

### A. *Conceptualizing Civil Rights and Antidiscrimination Law*

At the outset, discussing the mercurial nature of civil rights and antidiscrimination law can help facilitate an understanding of why the debate between anticlassification and antisubordination is so intense. It demonstrates how much is up for grabs and how high the stakes are in “winning” this debate.

In his book, *Civil Rights in America: A History*, Christopher Schmidt sets out to answer the “deceptively simple question: What do we mean when we say that something is an issue of civil rights?”<sup>19</sup> Schmidt explains that although civil rights are most commonly used to refer to protections against racial discrimination, dictionaries and legal

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16. See, e.g., Lithwick, *supra* note 15 (“[Chief Justice Roberts will] probably vote with the conservatives to gut Section 2.”); Colloquium, *Conversation with Professor Joshua Sellers*, Duke Law 551: Civil Rights Enforcement Colloquium (Professor Sellers “do[es] not believe that the Court will invalidate Section 2, but that [it] will read it in such a narrow way that states will have an effective license to redistrict in ways that reduce minority participation, or reduce the obligation that currently exists to create so-called ‘minority-opportunity’ districts.”) (quoting Joshua S. Sellers).

17. For example, at least one telling would take a deep dive into the history of the Civil Rights Movement and perhaps critical race theory. Another might develop the overlap between partisan political agendas and judicial methodology.

18. See *infra* Part I.B. (defining the two poles of the antidiscrimination debate).

19. CHRISTOPHER W. SCHMIDT, *CIVIL RIGHTS IN AMERICA: A HISTORY* 1 (Cambridge Univ. Press 2021).

references describe the term using “a mix of abstractions and stilted legalisms, none of which captures the depth and complexity of meaning that is conveyed with its invocation and none of which hints at historic and ongoing struggles over its contents.”<sup>20</sup> Rather than rely on textual definitions, Schmidt suggests that in order to understand the meaning of civil rights and antidiscrimination, “history is our best resource.”<sup>21</sup> Tracing history, Schmidt describes how various groups have struggled to claim the civil rights label. Conservatives have sought to couch various issues as efforts to advance civil rights.<sup>22</sup> These have included religious liberty, opposition to abortion, deregulation, and gun rights.<sup>23</sup> Liberals, in turn, have framed a group of antidiscrimination campaigns—including women’s rights, disability rights, and LGBTQ rights—as the “next civil rights movement.”<sup>24</sup>

This Commentary submits that because civil rights and antidiscrimination are “relatively open concept[s],”<sup>25</sup> they are vulnerable to ongoing reinterpretation. Much depends on who is in power and who has interpretive authority over what constitutes civil rights and antidiscrimination law. Accordingly, the current ideologically transformed Supreme Court is likely seizing its opportunity to reinterpret a host of civil rights era policies.<sup>26</sup>

### *B. Two Competing Views: Anticlassification v. Antisubordination*

In the 1970s, scholars began to respond to the Supreme Court’s increasingly complex equal protection doctrine by developing theories

20. *Id.*

21. *Id.* at 2.

22. *Id.* at 7.

23. *Id.*

24. *Id.*

25. *Id.*

26. The Court’s recent partisan shift has been widely publicized. *See e.g.*, Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court’s Partisan Divide Hasn’t Been This Sharp in Generations*, FIVETHIRTYEIGHT (Jul. 5, 2022), <https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations/> (“It’s now abundantly clear that Trump’s appointees are in control of this court, and they’re not searching for consensus.”); Stephen Jeseo et al., *A Decade-Long Longitudinal Survey Shows that the Supreme Court is Now Much More Conservative than the Public*, 119 No. 42 PROC. NAT’L ACAD. SCI. at 1 (2022) (“[T]he gap between the court and the public has grown since 2020, with the court moving from being quite close to the average American to a position that is more conservative than the majority of Americans.”). This term, the Supreme Court is also taking up affirmative action cases “challenging race-conscious admissions processes at Harvard and the University of North Carolina,” which “legal experts say . . . could spell the end of affirmative action in higher education.” Rahem D. Hamid et al., *‘Bad News for Harvard’: Future of Affirmative Action in Doubt as Conservative Court Takes Up Admissions Cases*, HARV. CRIMSON (Jan. 25, 2022), <https://www.thecrimson.com/article/2022/1/25/scotus-admissions-expert-opinions/>.

to frame antidiscrimination legal theory.<sup>27</sup> Over time, this scholarship has developed two fundamental and competing ideas: anticlassification and antisubordination. The anticlassification principle asserts that the use of social categories or classifications, racial or otherwise, is *itself* inherently unjust, and that courts should purge such distinctions from the law, root and branch.<sup>28</sup> By contrast, the antisubordination principle contends that courts should only be concerned with invalidating those classifications that stratify or “subordinate” groups.<sup>29</sup>

### 1. Anticlassification

The anticlassification principle opposes categorizing or classifying people on the basis of membership within a social identity group. Anticlassification reasoning tends to focus exclusively on individuals, eschewing intergroup dynamics.<sup>30</sup> Accordingly, anticlassification supporters believe that historical sociopolitical group context is irrelevant to a just application of antidiscrimination law and instead focus on the narrow, binary question of whether a law or policy classifies individuals based on membership in a protected class.<sup>31</sup> If it does, it is forbidden; if not, it is permissible. Anticlassification legal analysis thus tends to be quite formalist, which has taken on particular significance in recent years as the Court has shifted towards highly textual and originalist interpretative methodologies.<sup>32</sup>

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27. See *infra* note 38.

28. See *infra* Part I.B.1.

29. See *infra* Part I.B.2.

30. See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1058 (1986) (“That principle creates the presumption that *all* race- and sex-specific policies are discriminatory, and that *no* race- and sex-neutral policies are discriminatory unless accompanied by race- or sex-specific motivation.”); see also *Missouri v. Jenkins*, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) (“At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups.”); John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 892 (1995) (“[T]he colorblind position assumes that the law does not recognize groups, only individuals.”).

31. While anticlassification analysis is often highly textual, the broader theory does account for “surreptitious” classifications. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (“[A] law that does not explicitly classify by race may nevertheless be motivated by an invidious purpose to differentiate on the basis of race, and most people think that this also counts as a violation of the anticlassification or antidifferentiation principle.”).

32. See e.g., Joshua S. Sellers, *Election Law, Originalism, and Democratic Self-Government*, 75 FLA. L. REV. (forthcoming 2023); Reva B. Siegel, *Memory Games: Dobbs’s Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023).

Anticlassification proponents assert that legal reliance on group classifications, even as a remedy to historical voting and education discrimination, for example, keeps us in a vicious cycle of discrimination. They say that to break this cycle, we simply should stop invoking group classifications in the law. Period. This idea is often associated with “colorblindness.”<sup>33</sup> Indeed, supporters of the anticlassification principle frequently tout Justice Harlan’s famous dissent in *Plessy v. Ferguson*,<sup>34</sup> in which he proclaimed that “our Constitution is color-blind.”<sup>35</sup> For example, Justice Thomas directly invoked Justice Harlan’s “colorblind” vision in his *Parents Involved in Community Schools v. Seattle School District No. 1* concurring opinion.<sup>36</sup> Moreover, in writing for the *Parents Involved* plurality, Chief Justice Roberts made an unmistakably anticlassificationist quip: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>37</sup>

## 2. Antisubordination

The antisubordination principle takes no issue with group classification inherently, and instead applies heightened scrutiny only to laws that categorize groups in ways that create social hierarchies.<sup>38</sup> Antisubordinationists seek to uphold laws or policies that, despite their technical use of classifications, are designed to equitably benefit historically marginalized groups. Owen Fiss, who laid the foundation for antisubordination in 1976, defined it as the principle that laws may not “aggravate” or “perpetuate” “the subordinate status of a specially disadvantaged group.”<sup>39</sup> Thus, contrary to anticlassification, antisubordination analysis *necessarily* looks to sociopolitical and cultural context to answer the threshold question of whether a class has

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33. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1287 (2011) (“[P]roponents of the anticlassification principle associate the rule against classifying by race with a value commonly associated with colorblindness claims.”).

34. 163 U.S. 537 (1896).

35. *Id.* at 559 (Harlan, J., dissenting).

36. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 (2007) (Thomas, J., concurring) (“My view of the Constitution is Justice Harlan’s view in *Plessy*: ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’”) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

37. *Parents Involved*, 551 U.S. at 748 (plurality opinion).

38. Owen Fiss introduced the anti-subordination principle in 1976. See Balkin & Siegel, *supra* note 31, at 9 (“With the publication of *Groups and the Equal Protection Clause*, Owen Fiss inaugurated the antisubordination tradition in legal scholarship of the Second Reconstruction.”) (citing Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976)).

39. Fiss, *supra* note 38, at 157.

been historically disadvantaged. If this assessment demonstrates that a class has been disadvantaged, antistatutory analysis then looks to how the law at issue aims to treat the class. If the law “aggravates” or “perpetuates” the “subordinate status” of the class, then it is malignant, and must be cut out. But, if the law is instead designed to remedy past subjugation or to address structural societal obstacles blocking disadvantaged groups, then the law is benign—or even beneficent—and is permissible.<sup>40</sup>

Unlike antistatutory, antistatutory reasoning is heavily functionalist. The antistatutory principle is history-conscious and looks beyond the text of a statute to contextualize its operation in society.<sup>41</sup> Again, *Parents Involved* is instructive here. Justice Breyer noted in his dissenting opinion that “[t]he historical and factual context in which these cases arise is critical.”<sup>42</sup> Justice Breyer argued that the school districts should be allowed to maintain their school integration policies for “educational and democratic, *as well as for remedial*, reasons.”<sup>43</sup> Finally, Justice Breyer made a functional critique of Justice Thomas’s suggestion that “it will be easy to identify *de jure* segregation,”<sup>44</sup> pointing out that “[t]he histories also make clear the futility of looking simply to whether earlier school segregation was *de jure* or *de facto* in order to draw firm lines separating the constitutionally permissible from the constitutionally forbidden use of ‘race-conscious’ criteria.”<sup>45</sup> The vigorous debate amongst the fractured Court in *Parents Involved* evinces the tension and methodological distinctions between antistatutory and antistatutory approaches.

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40. Affirmative action and voting policies are the classic examples of permissible uses of group classification under the antistatutory principle.

41. See Samuel Mermin, *Legal Functionalism*, Communication, IV World Congress on Philosophy of Law and Social Philosophy, at 81–83 (Sept. 7–12, 1973), <https://repository.law.wisc.edu/s/uwlaw/ark:/86871/w122960d> (“Functionalists are concerned with law’s operative role in society.”).

42. *Parents Involved*, 551 U.S. at 804 (Breyer J., dissenting).

43. *Id.* at 820 (emphasis added).

44. *Id.*

45. *Id.* *De jure* segregation results from official laws and policies, while *de facto* segregation—segregation in fact—has been said to result from the choices of private citizens. Jonathan Fischbach, et al., *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491, 496 (2008).

### C. *The Court's Turn to Anticlassificationism*

An examination of the Supreme Court's antidiscrimination jurisprudence demonstrates an ongoing shift towards the anticlassification principle.<sup>46</sup> Moreover, the pace of this transition has accelerated in recent years. The faint origins of the debate can be seen in Justice Harlan's dissent in *Plessy*,<sup>47</sup> and the clash is on full display in *Parents Involved*.<sup>48</sup> In addition to public accommodations, the debate has also raged across education, affirmative action, employment law, and voting rights. In each of these areas, the Court has steadily moved towards anticlassification as its lodestar.

Starting with education, *Brown v. Board of Education* contained the outlines of the anticlassification versus antisubordination debate.<sup>49</sup> The famous language of *Brown's* holding that “[s]eparate educational facilities are inherently unequal”<sup>50</sup> initially appears anticlassificationist. It seems to support an argument that drawing racial lines to create separate facilities is necessarily unconstitutional because the line drawing *itself* is impermissible. But, consistent with the antisubordination principle, *Brown* also contextualized its holding with historical discussion and evidence demonstrating the negative psychological effects of segregation in education.<sup>51</sup> For example, in the opinion, Chief Justice Warren stated “[w]e must look instead to the effect of segregation itself on public education.”<sup>52</sup>

In *Regents of the University of California v. Bakke*, the Court firmly planted a flag for anticlassification in education admissions.<sup>53</sup> Justice Powell asserted that once strict scrutiny applies to a suspect classification, the analysis requires a “stringent examination without

46. See Powell, *supra* note 30, at 893 (“This colorblind, race-neutral position currently occupies center stage in the American debate on race, both in politics and in the law.”).

47. See *supra* discussion in Part I.B.1.

48. See *supra* discussion in Part I.B.

49. 347 U.S. 483 (1954).

50. *Id.* at 495.

51. The Supreme Court acknowledged Doctors Kenneth and Mamie Clark's now famous doll test. *Id.* at 494 n.11. The study used dolls to test “children's racial perceptions” and found that “a majority of the children preferred the white doll and assigned positive characteristics to it” leading the Drs. Clark to conclude that “prejudice, discrimination, and segregation created a feeling of inferiority among African-American children and damaged their self-esteem.” *A Revealing Experiment Brown v. Board and “The Doll Test,”* NAACP LEGAL DEF. & EDUC. FUND, INC., <https://www.naacpldf.org/brown-vs-board/significance-doll-test/> (last visited Nov. 14, 2022).

52. *Brown*, 347 U.S. at 492 (emphasis added).

53. 438 U.S. 265, 290 (1978) (Powell, J., concurring).



regard to” characteristics like insularity or discreteness.<sup>54</sup> Justice Powell thus shut the door on a nuanced analysis of admissions policies’ effects on historically subjugated classes.<sup>55</sup> In *Grutter v. Bollinger*, Justice O’Connor moved the needle somewhat back towards antisubordination, acknowledging “our Nation’s struggle with racial inequality”<sup>56</sup> and that “race unfortunately still matters.”<sup>57</sup> Nevertheless, Justice O’Connor focused on the benefits of diversity as the compelling state interest in college admissions, avoiding history of racial discrimination and political subjugation as valid state justifications.<sup>58</sup> Again, *Parents Involved* featured a direct confrontation on anticlassification versus antisubordination grounds, but the plurality’s rigid anticlassificationism carried the day.<sup>59</sup> Finally, anticlassification arguments may ultimately persuade the Court to forbid admissions programs from considering race in any way in *Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, which the Court heard last term.<sup>60</sup>

In employment law, the Court first applied anticlassification reasoning in the 1976 case *McDonald v. Santa Fe Trail Transportation Co.*, holding that Title VII’s terms are not limited to discrimination against members of any particular race but instead prohibit racial discrimination in private employment against white persons upon the

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54. *Id.* In the famous footnote four of *Caroline Products*, the Court hinted that laws might demand heightened Equal Protection scrutiny when motivated by “prejudice against discrete and insular minorities.” *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938). But Justice Powell’s anticlassification approach would apply strict scrutiny to any government action that uses racial classifications, even if the complainant is not targeted for his membership in any discrete or insular group—in *Bakke*, the plaintiff who sought admission to a state medical school was a white male. *Bakke*, 438 U.S. at 290 (Powell, J., concurring).

55. For many antisubordinationists, *Bakke*’s rejection of remedying historical discrimination as a compelling state interest was a consequential error in the Court’s antidiscrimination jurisprudence. For example, Bertrall Ross said that he “always gnashed his teeth at the diversity rationale,” but civil rights groups have been forced to lean on this weak rationale when what we should really be doing is addressing the history of discrimination that has left people of color in disadvantaged positions. American Constitution Society, *Merrill v. Milligan: The Latest Threat to the Voting Rights Act*, YOUTUBE (Oct. 3, 2022), <https://www.youtube.com/watch?v=DJwHyvLOQ-k>.

56. 539 U.S. 306, 338 (2003).

57. *Id.* at 333.

58. *See id.* at 327–33 (applying strict scrutiny to the University of Michigan Law School’s use of race in the admissions process).

59. *See supra* Part I.B.1–2.

60. Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html>.

same standards as racial discrimination against nonwhites.<sup>61</sup> The Court again employed anticlassification reasoning in 2009, in *Ricci v. DeStefano*.<sup>62</sup> The Court in *Ricci* “held, for the first time, that an employer’s attention to disparate impact against some may in fact be evidence of its disparate treatment of others.”<sup>63</sup> Most recently, in *Bostock v. Clayton County*, Justice Gorsuch’s opinion relied heavily on an anticlassification approach to sex-based classifications.<sup>64</sup> Although the Court rightly ruled that Title VII’s protections extend to discrimination based on sexual orientation and gender identity, it reached this conclusion through a highly textualist analysis of Title VII’s terms.<sup>65</sup> Moreover, in the anticlassification tradition, Justice Gorsuch repeatedly stressed that Title VII’s protections are concerned with individuals rather than groups.<sup>66</sup> Finally, the opinion made no mention of the historical discrimination that LGBTQ individuals have faced. That recognition was instead saved for Justice Kavanaugh’s dissent.<sup>67</sup>

The Court’s original validation of the VRA in *South Carolina v. Katzenbach* accounted for history to approve the VRA’s targeting states with the worst records of voting rights discrimination.<sup>68</sup> Likewise, the Court channeled the antisubordination principle in *Shaw v. Reno*, holding that racial gerrymandering claims must be analyzed against the backdrop of the country’s long history of voting discrimination.<sup>69</sup>

Writing for the majority in *Shelby*, Chief Justice Roberts did not necessarily apply traditional anticlassification reasoning with respect to racial classifications, but did apply a similarly strict formalist understanding of federalism and “the fundamental principle of equal

61. 427 U.S. 273, 278–285 (1976).

62. See 557 U.S. 557, 581–82 (2009) (reasoning that an employer’s good faith belief that its actions were necessary to comply with Title VII’s disparate-impact provision cannot justify race-conscious conduct because “the original, foundational prohibition of Title VII bars employers from taking adverse action ‘because of . . . race’”) (quoting 42 U.S.C. § 2000e-2).

63. Brad Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 993 (2012).

64. See generally 140 S. Ct. 1731 (2020).

65. *Id.* at 1737 (“When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law.”).

66. *Id.* at 1740 (emphasizing that Title VII’s text “tells us three times . . . that our focus should be on individuals, not groups”); see also Colker *supra* note 30.

67. *Bostock*, 140 S. Ct. at 1837 (Kavanaugh, J., dissenting).

68. See 383 U.S. 301, 308 (1966) (“[T]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”).

69. See *Shaw v. Reno*, 509 U.S. 630, 637–642 (1993) (tracing our nation’s post-Fifteenth Amendment history of denying the right to vote on the basis of race and stating that, “[i]t is against this background that we confront the questions presented here”).

sovereignty among the States.”<sup>70</sup> Moreover, the Court discarded decades of discriminatory history in favor of the fact that updated registration data showed that voter registration rates were roughly equivalent for white and Black voters throughout the “problem” states subject to Section 5.<sup>71</sup>

The *Shelby* Court showed little deference to the antidisubordination principle’s urging to dive deeply into sociopolitical and cultural context—not to lose the forest for the trees. The Court’s approach in *Shelby* thus tees up anticlassification as a modality for *Milligan*.

## II. ALLEN V. MILLIGAN

### A. Factual Background

Alabama, like every other state in the union, redistricted following the release of the 2020 United States Census data.<sup>72</sup> In November 2021, Alabama produced its new congressional maps, which included seven congressional districts but only one majority-Black district.<sup>73</sup> Under the new maps, Alabama’s Black voting population would control roughly 14 percent of Alabama’s congressional districts despite making up roughly 28 percent of the state’s voting age population.<sup>74</sup> Alabama, of course, has an egregious history of racial discrimination in voting.<sup>75</sup> Alabama’s voting outcomes are also dramatically polarized along racial lines: data shows that Black voters in Alabama vote disproportionately for Black candidates, while white voters vote for white candidates.<sup>76</sup> Under a traditional analysis of these facts, a court would likely find that

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70. 570 U.S. 529, 530 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

71. *Id.* at 531 (“Nearly 50 years [after passage of the VRA], things have changed dramatically. Largely because of the Voting Rights Act, voter turnout and registration rates in covered jurisdictions now approach parity.”) (quoting *Holder*, 557 U.S. at 202) (internal quotation marks omitted).

72. See generally, SARAH J. ECKMAN, CONG. RSCH. SERV., IN11360, APPORTIONMENT AND REDISTRICTING FOLLOWING THE 2020 CENSUS (Sept. 29, 2021).

73. Richard L. Hasen, *Episode 3:6: Deuel Ross: Everything You Wanted to Know About the Alabama Voting Rights Redistricting Case But Were Too Confused to Ask*, ELB PODCAST, (Feb. 22, 2022), <https://soundcloud.com/rick-hasen/elb-podcast-ep-36-deuel-ross-everything-you-wanted-to-know-about-ala-voting-rights-case> (last visited Dec. 19, 2022).

74. *Id.*

75. Alabama was the epicenter of the struggle to pass the Voting Rights Act of 1965. For more on Alabama’s voting rights history see James Blacksher, et al., *Voting Rights in Alabama: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 249, 249 (2008).

76. For more on defining racially polarized voting and its use as a diagnostic tool in redistricting cases, see Christopher S. Elmendorf, et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587 (2016).

Alabama’s congressional maps violated Section 2, noting that Black voters are underrepresented, that there are demonstrably racially polarized voting patterns, and that it is feasible to draw a second compact majority-Black district.<sup>77</sup>

### B. Legal Background

Following the release of Alabama’s new maps, the NAACP Legal Defense Fund quickly filed an emergency petition on behalf of Alabama’s Black voters with the United States District Court for the Northern District of Alabama, alleging three distinct claims.<sup>78</sup> The plaintiffs first charged that Alabama’s redistricting is an unconstitutional racial gerrymander; second, that this effort is intentional racial discrimination; and third, that the maps violate Section 2 of the Voting Rights Act.<sup>79</sup>

The plaintiffs’ Section 2 claim invokes the *Thornburg v. Gingles*<sup>80</sup> threshold test and then a separate “totality of the circumstances test.”<sup>81</sup> Under *Gingles*, a plaintiff must show that the protected minority group is (1) populous enough and (2) geographically compact such that a single-member congressional district could be drawn, and (3) the minority group votes consistently for certain candidates while the white majority votes to defeat those candidates.<sup>82</sup> If the *Gingles* threshold is met, then courts move on to a multi-factor totality of the circumstances test to determine whether minority voters have less opportunity to elect candidates of their choice.<sup>83</sup> If so, then a Section 2 violation has

77. See, e.g., *Singleton v. Merrill*, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022) (concluding “that the *Milligan* plaintiffs are substantially likely to establish each part of the controlling [*Gingles* plus totality of the circumstances] test”). See also *infra* notes 79–83 and accompanying text for discussion of the governing test.

78. Hasen, *Episode 3:6: Deuel Ross: Everything You Wanted to Know About the Alabama Voting Rights Redistricting Case But Were Too Confused to Ask*, *supra* note 73.

79. *Id.*

80. 478 U.S. 30, 48–51 (1986); see also *Grove v. Emison*, 507 U.S. 25, 40 (1993) (explaining that a Section 2 plaintiff “must prove three threshold conditions”: “first, that the minority group is sufficiently large and geographically compact to constitute a majority in a . . . district; second, that [the minority group] is politically cohesive; and third, that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidate”) (internal quotation marks omitted).

81. *Johnson v. De Grandy*, 512 U.S. 997, 1017–18 (1994).

82. *Gingles*, 478 U.S. at 30.

83. Courts have employed the totality of the circumstances test unpredictably in Section 2 cases. Some have focused on whether the minority community can elect a “roughly proportional” number of its candidates of choice. Others have used the test to assess whether the plaintiffs’ injury is traceable to intentional race discrimination, and whether it is traceable to traditional state actors. For more on the complexities of applying the totality of the circumstances test in Section 2 cases, see Elmendorf & Spencer, *supra* note 3, at 2155–56.

occurred, the usual remedy for which is drawing another district. Notably, to prove a Section 2 violation, a litigant need only demonstrate that the challenged maps have a discriminatory result or effect; a plaintiff does not need to show that the challenged maps were drawn with discriminatory intent.<sup>84</sup>

The plaintiffs' racial gerrymandering and intentional discrimination claims, on the other hand, are constitutional claims grounded in the Equal Protection Clause of the Fourteenth Amendment.<sup>85</sup> Unlike the Section 2 claims, which require only a showing of disparate impact, these are disparate treatment claims, which do require a showing of intent.<sup>86</sup> Thus, to succeed on these claims, the *Milligan* plaintiffs would need to prove that the Alabama legislature drew district lines with the purpose of diluting Black voting power. But, proving such claims typically requires extensive evidence, which the plaintiffs were not in a position to introduce during the brief preliminary injunction hearing phase.<sup>87</sup>

### C. *Prior Disposition*

The plaintiffs' constitutional claims triggered a panel of three district court judges.<sup>88</sup> In January 2022, a three-judge panel of the United States District Court for the Northern District of Alabama unanimously ruled in favor of the plaintiffs, issuing a preliminary injunction preventing Alabama from using its new maps in any congressional elections.<sup>89</sup> The injunction was accompanied by a lengthy opinion explaining that, in the panel's view, the plaintiffs were

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84. Transcript of Oral Argument at 13, *supra* note 15, (“[W]e have said on numerous occasions that intent is not required, and the reason we’ve said it on numerous occasions is because that’s what Congress said.”) (Kagan, J.).

85. See *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (holding that plaintiffs’ racial gerrymandering claim was cognizable under the Equal Protection Clause of the Fourteenth Amendment); see also U.S. CONST. amend. XIV § 1 (“No state shall . . . deny to any person . . . the equal protection of the laws.”).

86. *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (“The Equal Protection Clause forbids ‘racial gerrymandering,’ that is, *intentionally* assigning citizens to a district on the basis of race without sufficient justification.”) (citing *Shaw*, 509 U.S. at 641) (emphasis added).

87. Hasen, *Episode 3:6: Duel Ross: Everything You Wanted to Know About the Alabama Voting Rights Redistricting Case But Were Too Confused to Ask*, *supra* note 73.

88. While challenges to districting plans under the Voting Rights Act do not qualify for the three-judge panel procedure, constitutional challenges to statewide reapportionment schemes are heard by a panel of three federal district court judges. Ben Williams, *Why Only Some Redistricting Cases Get Three-Judge Courts*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 1, 2020), <https://law-journals-books.vlex.com/vid/why-only-some-redistricting-863604513>.

89. *Singleton v. Merrill*, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022).

substantially likely to succeed on the merits of their Section 2 claims.<sup>90</sup> The panel declined to address the plaintiffs’ constitutional claims of intentional discrimination and racial gerrymandering because the preliminary injunction on Section 2 grounds effectively disposed of the case.<sup>91</sup>

Alabama subsequently appealed the panel’s order and sought emergency relief in the Supreme Court.<sup>92</sup> Alabama first argued that a stay was warranted given the upcoming elections.<sup>93</sup> Second, the state argued that drawing a second majority-Black district would amount to a racial gerrymander, thus, the plaintiffs’ proposed remedy would be unconstitutional regardless of whether there was a Section 2 violation.<sup>94</sup>

In a 5–4 decision, the Supreme Court granted Alabama’s petition for a stay and agreed to hear the case on the merits.<sup>95</sup> Alabama’s challenged maps therefore remained in place for both the 2022 primary and general elections. Justices Gorsuch, Thomas, and Barrett did not explain their reasoning for granting the stay. Justice Kavanaugh, joined by Justice Alito, wrote a concurrence invoking the *Purcell* principle—which stands for the proposition “that courts should not issue orders which change election rules in the period just before the election”<sup>96</sup>—arguing that it required the Court “to stay the District Court’s injunction with respect to the 2022 elections.”<sup>97</sup> Justice Roberts voted to deny the stay, but clarified that although the district court panel faithfully applied current law, he would be willing to reconsider the standard for Section 2 cases.<sup>98</sup> Justices Breyer, Sotomayor, and Kagan

90. *Id.*

91. *Id.* at 1035.

92. Appellants’ Emergency Application for Administrative Stay and Stay or Injunctive Relief Pending Appeal to the Supreme Court of the United States, *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (No. 21-1086); 28 U.S.C. § 1253 (“any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction . . . heard and determined by a district court of three judges.”).

93. Appellants’ Emergency Application for Administrative Stay and Stay or Injunctive Relief Pending Appeal to the Supreme Court of the United States, *supra* note 92, at \*3–4.

94. *Id.* at \*21–22, \*30.

95. *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.).

96. Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016).

97. *See Milligan*, 142 S. Ct. at 880–82 (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). But, according to Richard Hasen, applying the *Purcell* principle to this case would be an expansion of the doctrine, bordering on a “you get one illegal gerrymander first kind of rule.” Hasen, *Episode 3:6: Deuel Ross: Everything You Wanted to Know About the Alabama Voting Rights Redistricting Case But Were Too Confused to Ask*, *supra* note 73.

98. *Milligan*, 142 S. Ct. at 882–83 (Roberts, C.J., dissenting). This was the first time that Chief Justice Roberts has ever voted in favor of VRA Section 2 plaintiffs. Hasen, *Episode 3:6: Deuel Ross: Everything You Wanted to Know About the Alabama Voting Rights Redistricting Case But*

wrote that the plaintiffs were entitled to a remedy before the 2022 elections, as the District Court held.

#### *D. The Issues*

Alabama made two principal arguments in its appeal on the merits. First, the appellants argued that Section 2's "results test"<sup>99</sup> is unconstitutional because the VRA can only constitutionally forbid intentional discrimination.<sup>100</sup> Second, the appellants argued that the first *Gingles* precondition, a plaintiff's demonstration that another majority-minority district could be drawn,<sup>101</sup> can only be met in a constitutionally permissible manner by applying race-neutral redistricting principles.<sup>102</sup> According to Alabama, intentionally relying on race in drawing a majority-minority congressional district would *itself* amount to an unconstitutional racial gerrymander.<sup>103</sup> Thus, in a vein similar to *Ricci*,<sup>104</sup> Alabama essentially argued that if a state draws its districts so as to avoid disparately impacting racial minorities, this race-conscious approach will result in the disparate treatment of racial groups outside the targeted minority group.

The appellees likewise made two principal arguments in their brief on the merits.<sup>105</sup> First, the appellees argued that the district court correctly applied the *Gingles* preconditions and totality of the circumstances test to establish that Alabama's redistricting maps violate Section 2 of the VRA.<sup>106</sup> Second, the appellees urged that

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*Were Too Confused to Ask*, *supra* note 73.

99. See Timothy G. O'Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 766 n.11 (1983) (explaining that the 1982 Amendments to the Voting Rights Act clarified that a Section 2 plaintiff "need only show that a practice . . . results in a denial or abridgment of the right to vote" and "reverse[d] the Supreme Court's plurality view in *City of Mobile v. Bolden*, 446 U.S. 55, 61–65 (1980), that a successful action under the previous language of [Section 2] required a showing that a challenged practice was created or maintained with intent to discriminate") (emphasis added). See also Transcript of Oral Argument at 13, *supra* note 15.

100. If the Court adopted this argument, it could have far-reaching ramifications for disparate impact theory's viability throughout antidiscrimination law in general.

101. See *supra* note 82 and accompanying text.

102. Appellants' Emergency Application for Administrative Stay and Stay or Injunctive Relief Pending Appeal to the Supreme Court of the United States, *supra* note 92, at \*19–28. *C.f.* *Thornburg v. Gingles*, 478 U.S. 30, 30 (1986).

103. Appellants' Emergency Application for Administrative Stay and Stay or Injunctive Relief Pending Appeal to the Supreme Court of the United States, *supra* note 92, at \*21–22, \*30.

104. See *infra* Part I.C.

105. Brief for *Milligan* Appellees, *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (No. 21-1086).

106. *Id.* at \*24.

Alabama’s arguments regarding race-neutrality and intent are contrary to Section 2’s text and Supreme Court precedent.<sup>107</sup>

### *E. Oral Arguments*

The Supreme Court held oral arguments in *Milligan* on October 4, 2022.<sup>108</sup> Oral arguments suggested that the Court has less sympathy for Alabama’s argument that Section 2’s results test is unconstitutional. But the Court appeared more amenable to reworking the *Gingles* factors in a way that would make it much more difficult for future plaintiffs to make out Section 2 cases.<sup>109</sup>

Justice Alito seemed most interested in revising the first *Gingles* factor in a way that would “essentially bring race neutrality in through the back door.”<sup>110</sup> Justice Jackson vigorously pushed back against Justice Alito.<sup>111</sup> Justices Barrett and Kavanaugh and Chief Justice Roberts asked clarifying questions, signaling that they may be open to revisiting *Gingles*.<sup>112</sup> Justices Thomas and Gorsuch said little, but, in a concurring opinion joined by Justice Gorsuch, Justice Thomas previously stated his belief that the VRA does not apply to redistricting.<sup>113</sup>

Though perhaps in a losing effort, Justice Jackson proudly carried the antisubordination mantle during oral arguments. Justice Jackson explained that the framers passed the Fourteenth and Fifteenth Amendments “in a race conscious way”<sup>114</sup> and “that the entire point of

107. *Id.* at \*30.

108. Transcript of Oral Argument at 1, *supra* note 15.

109. Richard L. Hasen, *Oral Argument Analysis of Merrill v. Milligan: Alabama Won’t Get All It Wants in Voting Rights Redistricting Case, But It May Well Get Enough*, ELECTION L. BLOG, (Oct. 4, 2022), <https://electionlawblog.org/?p=132252>.

110. *Id.*

111. Transcript of Oral Argument at 22, *supra* note 15.

112. *Id.* at 45, 47–50 (Kavanaugh, J.); 52–56 (Barrett, J.); 16, 37, 102 (Roberts, C.J.). Nonetheless, these same Justices appeared open-minded in *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021), but ultimately joined Justice Alito’s opinion. Hasen, *Oral Argument Analysis of Merrill v. Milligan: Alabama Won’t Get All It Wants in Voting Rights Redistricting Case, But It May Well Get Enough*, *supra* note 109.

113. See *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (Thomas, J., concurring) (“I adhere to my view that § 2 of the Voting Rights Act of 1965 does not apply to redistricting.”). Justices Thomas and Gorsuch apparently interpret Section 2’s text barring any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement . . . to vote on account of race or color” as not contemplating congressional redistricting. 52 U.S.C. § 10301. Accordingly, they seem to believe that the *Milligan* plaintiffs’ vote dilution claims are simply not cognizable under Section 2.

114. Transcript of Oral Argument at 57, *supra* note 15.



the amendment was to secure the rights of the freed former slaves.”<sup>115</sup> Justice Jackson argued “that’s not a race-neutral or race-blind idea in terms of the remedy.”<sup>116</sup> Therefore, according to Justice Jackson, Section 2’s call to examine race does not violate the Fourteenth Amendment.<sup>117</sup> Justices Kagan and Sotomayor seemed prepared to support Justice Jackson’s perspective with Justice Kagan stating that application of current Supreme Court precedent makes this case “kind of a slam dunk” for the appellees.<sup>118</sup>

In sum, Chief Justice Roberts, Justices Alito, Kavanaugh, and Barrett all appear open to revisiting *Gingles*, while Justices Gorsuch and Thomas would perhaps go further in siding with Alabama. Justices Sotomayor, Kagan, and Jackson seem prepared to hold for the appellees and maintain the *Gingles* precedent. A likely outcome is for the six conservative Justices to align behind an opinion that alters *Gingles* in a way that would require Section 2 plaintiffs to challenge congressional maps with their own “illustrative maps” built entirely on race-neutral redistricting principles.<sup>119</sup> Accordingly, the Court could avoid rewriting or invalidating Section 2, while embracing the anticlassification principle and demanding that future Section 2 plaintiffs prove their claims on race-neutral grounds.

#### IV. ANALYSIS

The antistatutory and anticlassification principles’ competing values underpin a larger political and cultural disagreement regarding the best way to achieve a just and harmonious society. The former asserts that the path forward depends on directly and honestly examining our nation’s past. The latter counters that doing so only perpetuates inequality by keeping it in the fore and that classifications trap us in a never-ending cycle. These values are now squarely at issue in *Milligan*.

Alabama’s argument in *Milligan* essentially asserts that Section 2 of the VRA is unconstitutional because in order to comply with it, states are forced to impermissibly consider race in redistricting. Thus, majority-minority districts can only be permissibly drawn if they are drawn inadvertently. In other words, Alabama argues that under

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115. *Id.* at 58.

116. *Id.*

117. *Id.* at 59.

118. *Id.*

119. *See supra* notes 82, 102 and accompanying text.

*Gingles* step one, the appellees must show that the state could draw a second majority-minority district. But, according to Alabama, doing so would constitute a racial gerrymander itself because the state would be facially factoring in race.

This reasoning seems to effectively “turn the [VRA] on its head,”<sup>120</sup> and directly contravenes Congress’s intent when it amended Section 2 in 1982 to address vote dilution in Alabama.<sup>121</sup> Perhaps more importantly, accepting Alabama’s argument may require the Court to effectively invalidate Section 2 for considering race in a manner inconsistent with the Fourteenth Amendment, reasoning reminiscent of Justice Scalia’s laments that disparate impact theory is irreconcilable with disparate treatment theory.<sup>122</sup>

Like other bright-line rules, Alabama’s argument has a certain logical appeal on its surface. But “colorblindness” in the law, like those who claim to “not see color” in their daily lives, is an implausible gloss, which tends to cover the more complicated, troubling story.<sup>123</sup> Furthermore, aside from being a dubious virtue, the claim that the Constitution is colorblind is itself highly questionable. Because the Constitution only mentions race in the Fifteenth Amendment,<sup>124</sup> it *could* be called “colorblind.” But even a rudimentary understanding of history demonstrates that the Slave Trade Clause,<sup>125</sup> the Three-Fifths Clause,<sup>126</sup> and the Fugitive Slave Clause,<sup>127</sup> were anything but

120. Hasen, *Episode 3:6: Duel Ross: Everything You Wanted to Know About the Alabama Voting Rights Redistricting Case But Were Too Confused to Ask*, *supra* note 73.

121. *Id.*

122. *Ricci v. Destefano*, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring).

123. For instance, preceding Justice Harlan’s famous quote in *Plessy* was overt white supremacy: “the white race” is “the dominant race in this country” and “will continue to be for all time.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). *See also*, Theodore R. Johnson, *How Conservatives Turned the ‘Color-Blind Constitution’ Against Racial Progress*, ATLANTIC (Nov. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221/> (explaining how conservatives have “weaponized” the colorblind Constitution idea).

124. *See* U.S. CONST. amend. XV, § 1 (“The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

125. *See* U.S. CONST. art. 1, § 9, cl. 1 (“The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by Congress prior to [1808] . . .”).

126. *See* U.S. CONST. art. 1, § 2, cl. 3 (“Representatives . . . shall be apportioned among the several states . . . according to their respective numbers, which shall be determined by adding to the whole number of free persons . . . [and] three fifths all *other persons*.”).

127. *See* U.S. CONST. art. 4, § 2, cl. 3 (“No person held to service or labour in one state . . . escaping into another, shall . . . be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.”).

colorblind. Similarly, the colorblind approach ignores the deeper structural, cultural, and historical forces that drive the law in favor of dictionary definitions and surface-level distinctions.

The Court's disastrous opinion in *Shelby* has paved the way for a bevy of state legislation designed to restrict voting. A similar ruling in *Milligan* might fully deplete civil rights litigants' arsenals in fighting the current battle for American democracy. Unfortunately, it appears as though the Court will continue to rely on the anticlassification principle in its rollback of the hard-won gains of the Civil Rights Era.

#### CONCLUSION

The antisubordination principle calls on us as a people to bring the darkness of our past into the light and confront it, lest we repeat it. Like scouring a wound, this reckoning might be painful, but it is the only way to heal our country's racial trauma. The anticlassification principle would have us bury our past and allow our wounds to fester in favor of formalist analyses and specious values like colorblindness and race-neutrality. As the Court hurtles towards anticlassificationism, this Commentary concludes with Justice Breyer's reminder that "[t]he purpose of the law is to work, to work for the people."<sup>128</sup>

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128. Emily Bazelon, *How Will Trump's Supreme Court Remake America*, N.Y. TIMES MAG. (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html> (quoting Justice Breyer on the rise of textualism).